IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1258

THE STATE OF MINNESOTA, by WARREN SPANNAUS, its Attorney General, *Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

No. 77-1265

THE MARQUETTE NATIONAL BANK OF MINNEAPOLIS, *Petitioner*,

v.

FIRST OF OMAHA SERVICE CORPORATION, *Respondent*.

MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE A BRIEF OF AMICUS CURIAE

The Conference of State Bank Supervisors hereby moves, pursuant to Rule 42(3) of the Rules of this Court, for leave to file the attached brief as *amicus curiae.* The petitioners have consented to the filing of such a brief. The respondent has refused consent.

The Conference of State Bank Supervisors (Supervisors) is an association founded in 1902 consisting of the officials of state governments responsible for the regulation of state-chartered banking institutions in the 50 states, as well as their counterparts in Puerto Rico, the Virgin Islands, and Guam. As of December 31, 1977, the Conference's members had jurisdiction over 10,550 state-chartered commercial and mutual savings banks with total resources of approximately 670 billion dollars. (See Appendix A).

As more fully set forth in the brief, the state banking system, which the members of the Conference are charged with supervising, will be directly, substantially and adversely affected by the decision of the court below. That decision will place national banks in a clear position of competitive superiority over state banks in the vital area of interest rates—the very crux of the banking business. It permits out-of-state national banks to charge interest rates which a state does not allow for any lender within the state.

The decision in this case will critically affect the state banking system in every state—not just Minnesota. The Conference is in a unique position to bring a nationwide perspective to the resolution of the issue in this case, representing as it does the supervisors of state banking in all the states. The Conference has previously been permitted to appear as *amicus curiae* by this Court in other cases involving the competitive equality of the state and national banking systems. *First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969); *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339 (1968).

The Conference also believes that in dealing with the issue presented to this Court in the petitions for certiorari the Court must reconsider its earlier decision in *Tiffany* v. *National Bank of Missouri,* 85 U.S. (18 Wall.) 409 (1873), which held that national banks could charge the interest rates within a state permitted by that state to any lender, even if state banks were not allowed to charge such rates. This issue should be—and has not been—fully presented to this Court. Since the decision below will expand this competitive superiority of national banks by allowing them to export interest rates from one state to another state, the Court should be presented with a diverse, comprehensive discussion of the ramifications of this important question.

For these reasons, the motion for leave to file the attached brief of *amicus curiae* should be granted.

Respectfully submitted,

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July 6, 1978

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BRIEF OF THE CONFERENCE OF STATE BANK SUPERVISORS AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Conference of State Bank Supervisors respectfully submits this brief as *amicus curiae* in support of Petitioners in this case.

The Conference of State Bank Supervisors (Supervisors) is an association founded in 1902 consisting of the officials of state governments responsible for the regulation of state-chartered banking institutions in the 50 states, as well as their counterparts in Puerto Rico, the Virgin Islands, and Guam. As of December 31, 1977, the Conference's members had jurisdiction over 10,550 state-chartered commercial and mutual savings banks with total resources of approximately $670 billion. (See Appendix A).

The Board of Directors of the Conference, consisting of state bank supervisors, is the governing body of the Conference under its articles, with authority to supervise the Conference's affairs and determine its policies.[1] The Conference's Board has directed participation in these cases as an *amicus curiae*, subject to permission from this Court.

As officials of the governments of the various states, the Supervisors share the concern of the Petitioner, the State of Minnesota, over the necessity of preserving the integrity of its usury laws in the face of an out-of-state national bank seeking to charge a higher rate of interest than is permitted under state law. The right of a state to protect its citizens from what it considers to be oppressive rates of interest should not be preempted unless federal policy unmistakably so requires.

The Supervisors' interest in this case, however, is broader. It relates to their responsibility for a sound state-chartered banking system able to meet the needs

[1] The Conference invited state-chartered banks and mutual savings banks to become "associate members" in 1958, and there are currently 5,694 such associate members. Representatives from the associate membership advise and assist the Board of Directors, but do not determine policy for the Conference.

of the communities which it serves, and able to compete with national banks within the framework of the dual banking system. This dual system consists of state banks, chartered and regulated by the State Banking Supervisor members of the Conference, and national banks, chartered and regulated by the Comptroller of the Currency under the provisions of the National Bank Act of 1864, as amended.[2] As of December 31, 1977, there were 4,655 national banks with assets in excess of $655 billion. (See Appendix A).

Although state statutes, governing state banks, and the National Bank Act, governing national banks, can (and do) vary in many significant areas, the survival of one or the other class of banks in any state must rest upon an equality in certain basic competitive areas. If one or the other class of banks in a particular state is substantially competitively disadvantaged, such disadvantaged banks will convert to the other system, eventually leaving the dual banking system an empty shell.

Congress, in exercising its power over national banks, resolved this dilemma by establishing a "policy of equalization" between the two classes of banks by giving special weight to the applicability of state law to national banks. *First National Bank of Logan* v. *Walker Bank & Trust Co.* 385 U.S. 252, 261 (1966); *Lewis* v. *Fidelity and Deposit Co., of Maryland,* 292 U.S. 559, 565-566 (1934). The preservation of competitive equality between state and national banks is a matter of crucial concern to the State Bank Supervisors, and in its defense the Conference has on a num-

[2] Act of June 3, 1864, ch. 106, 13 Stat. 99, 12 U.S.C. § 21 *et seq.*

ber of occasions filed briefs as *amicus curiae* both with this Court [3] and with lower federal courts.[4]

The cases at bar squarely pose the issue of competitive equality in the critical area of interest rates. Specifically at issue is the question whether, under 12 U.S.C. § 85 and the National Bank Act of 1864,[5] a Nebraska national bank may charge a higher rate of interest in Minnesota than Minnesota permits any lender in that state to charge, including Minnesota national banks. The resolution of this question depends upon this Court's willingness to apply to interstate transactions the rationale of its decision in *Tiffany* v. *Bank of Missouri,* 85 U.S. (18 Wall.) 409 (1873), holding that *in-state* national banks are permitted under 12 U.S.C. § 85 to charge a higher rate of interest than that permitted their competitor state banks by state law.

[3] *E.g., First National Bank in Plant City* v. *Dickinson,* 396 U.S. 122 (1969); *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339 (1968).

[4] *Independent Bankers Assn. of America* v. *Smith,* 534 F.2d 921 (D.C. Cir. 1976), *cert. denied,* 429 U.S. 862 (1976); *Colorado ex rel. State Banking Bd.* v. *First Nat'l. Bank of Ft. Collins,* 540 F.2d 497 (10th Cir. 1976), *cert. denied,* 429 U.S. 1091 (1977); *Illinois ex rel. Lignoul* v. *Continental Illinois Nat'l. Bank and Trust Co.,* 536 F.2d 176 (7th Cir. 1976), *cert. denied,* 429 U.S. 871 (1976); *Virginia ex rel. State Corp. Comm'n* v. *Farmers & Merchants Nat'l. Bank,* 515 F.2d 154 (4th Cir. 1975), *cert. denied,* 423 U.S. 869 (1975); *Washington Mutual Savings Bank* v. *Federal Deposit Ins. Corp.,* 482 F.2d 549 (9th Cir. 1973); *Leuthold* v. *Camp,* 405 F.2d 499 (9th Cir. 1969); *Walker Bank & Trust Co.* v. *Saxon,* 352 F.2d 90 (10th Cir. 1965), *aff'd. sub. nom.,* 385 U.S. 252 (1966); *Jackson* v. *First Nat'l. Bank of Valdosta,* 349 F.2d 71 (5th Cir. 1965); and *Whitney Nat'l. Bank in Jefferson Parish* v. *Bank of New Orleans & Trust Co.,* 323 F.2d 290 (D.C. Cir. 1963), *rev'd,* 379 U.S. 411 (1965).

[5] Act of June 3, 1864, ch. 106, § 30, 13 Stat. 108 (1864), *as amended,* 12 U.S.C. § 85 (1976).

Tiffany currently constitutes the most important exception to settled law establishing competitive equality between state and national banks in major areas of banking practice. The Supervisors respectfully submit that this decision should be reexamined as a subsidiary issue to the one posed in this case of whether the *Tiffany* rationale should be extended to interstate transactions.[6]

It may be asked at this point why the right of a national bank to charge a higher rate than a state bank constitutes competitive inequality for state banks within the atmosphere of the highly competitive banking industry. For many years that right, first permitted by this Court in a construction of 12 U.S.C. § 85 and the National Bank Act in the *Tiffany* case in 1873, was indeed a right without practical business significance. But credit conditions and modes have changed enormously from those existing in 1864 when Congress enacted the National Bank Act. Relatively simplistic state "usury" statutes of that era have mushroomed into a multiplicity of state statutes setting forth different finance charge ceilings for new forms of credit vehicles never envisioned a century ago. This phenomenon of non-bank credit vehicles performing specialized services (*e.g.,* credit cards, savings & loans, credit unions, etc.) has coincided with a decade of historically high interest rates which have approached usury ceilings heretofore considerably higher than the interest rates of the market place.

There are, therefore, within each state today wide variations between lower rates which a state bank may

[6] The court below could not, of course, have reexamined and overruled *Tiffany,* a decision of this Court.

charge, and higher rates which may be charged by other lenders and hence, within certain limits, by national banks. Appendices B and C set forth examples of those variations. State banks increasingly find themselves disadvantaged as against their national bank competitors. In some instances, particularly in areas of high risk, high cost loans for which the state has permitted higher interest rates to encourage specialized institutions to reach particularized markets, state banks with their lower interest rate ceilings are precluded from the market as a matter of state policy. Their competitor national banks, however, are permitted to match those rates for other lenders under *Tiffany* which construed Section 85 to permit national banks to charge the highest rate available to any lender in the state (including non-banks), even if state banks are limited to a lower rate. Under *Tiffany* the only way a state can assure state banks competitive equality with national banks is to include state banks within the same rate classification established for other lenders permitted to charge higher rates, even if the state may consider such action to be contrary to its public policy. This result, as this brief will demonstrate, is contrary to the intent of Congress to establish a policy of equalization based upon state law in the major areas of competition between state and national banks.

The interest of the Supervisors may be summarized this way: the ability of state banks to compete with national banks, and hence the vitality of the state chartered banking system, depends in large part upon whether both state and national banks play by the same basic "ground rules" in important competitive areas. The question of the manner in which Congress intended to apply state law regarding interest rates

to national banks is important to the maintenance of competitive equality between national and state banks within the framework of the dual banking system. It is for this reason that the Supervisors seek to appear as *amicus curiae* in this case.

SUMMARY OF ARGUMENT

In creating national banks, Congress could have treated the problem of potential competitive inequality in the corporate powers of state and national banks in one of two ways. First, it could have established the powers of national banks without any reference to state law whatever, which would have required 50 state legislatures to monitor closely congressional action and quickly amend their laws relating to state banks in order to maintain parity for state banks with their national bank competitors. Second, Congress could assure through its action that national banks held the same authority as state banks, either through specific deference to state law in the National Bank Act or by declining to occupy the field so as to permit the application to national banks of state laws which do not conflict with federal law.

Congress adopted the second alternative which has been described by this Court as a "policy of equalization" underlying the National Bank Act of 1864 and followed in subsequent amendments to that act. Thus, in *First National Bank of Logan* v. *Walker Bank & Trust Co.,* 385 U.S. 252 (1966), in construing the provisions of Section 36 of the National Bank Act, first enacted in 1927, permitting national banks to branch to the extent permitted state banks by state law,[7] this Court stated:

[7] 44 Stat. 1228 (1927), *as amended,* 12 U.S.C. § 36(c) (1976).

> To us it appears beyond question that the Congress was continuing its policy of equalization first adopted in the National Bank Act of 1864. See Lewis v. Fidelity & Deposit Co., 292 U.S. 559, 565-566 (1934); McClellan v. Chipman, 164 U.S. 347 (1896); Chase Securities Corp. v. Husband, 302 U.S. 660 (1938); Anderson Nat. Bank v. Luckett, 321 U.S. 233 (1944).

385 U.S. at 261.

This "policy of equalization", frequently enunciated by this Court, stands in direct conflict with the holding below sustaining the right of an out-of-state national bank to charge a higher rate than is permitted under state law to any lender within the state, including state and national banks. It also stands in direct conflict with this Court's decision in the *Tiffany* case in 1873, upon which the Respondent heavily relies, holding that Congress intended a policy of inequality with regard to the interest rates charged by national and state banks *within* a state. The Supervisors contend that Tiffany was incorrectly decided and should be overruled. If, however, the Court declines to overrule *Tiffany,* the applicable statutory provision, 12 U.S.C. § 85, should not be interpreted to permit an out-of-state national bank to charge a higher interest rate within a state than that state permits to any of its lenders, including state and naional banks.

I.

In construing the interest rate provisions of the National Bank Act, 12 U.S.C. §§ 85 and 86, the *Tiffany* court was influenced by the fact that it was dealing with a penalty provision, 12 U.S.C. § 86 (twice

interest), and held that a "literal construction" was thereby required. It is difficult, however, to reconcile that approach with the result achieved. 12 U.S.C. § 85 authorized national banks to charge an interest rate allowed by the laws of the state where the bank is located, except that if state law provides a "different" rate for state banks, that rate "shall be allowed" to national banks. That provision could have been construed in accordance with the "policy of equalization" to permit national banks to charge the rate permitted state banks, except in those instances where no rate is specifically prescribed for state banks, national banks may charge the general rate permitted all lenders, including state banks. What the Court did, however, was to read the word "different" so as to mean "higher," thus giving national banks a preferred lender status *vis-a-vis* state banks.

The result the Court reached, therefore, did not rest upon a literal interpretation of the statute. Nor was it required by the 1864 legislative history of 12 U.S.C. § 85 which was not referenced by the Court in its opinion. What did obviously influence the Court was the action taken by Congress in 1865,[8] a year *after* the National Bank Act of 1864, in placing a prohibitive tax on state bank notes, then the principal source of state bank income.[9] This led the Court to conclude that "National banks have been National favorites," and to support a preferred lender status

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[8] Act of Mar. 3, 1865, ch. 78, 13 Stat. 484.

[9] Board of Governors of the Federal Reserve System, *Banking Studies* 45 (1941). *See generally,* Carson, ed. *Banking & Monetary Studies* (1963); Prochnow, *American Financial Institutions* (1961).

for national banks by reliance on a congressional intent to give "advantage to National banks over their State bank competitors." 85 U.S. 409, 413.

The fact is, however, that the Court's burial of the state banking system was premature. It is true that in 1873 when the Court decided *Tiffany,* the number of state banks was at its nadir, down to 277 from 1,089 in 1864, leading the Court to conclude that they "have been substantially taxed out of existence." *Id.* Nevertheless, state banks revived dramatically due to the development and profitability of deposit banking and by 1892 exceeded the number of national banks.[10] In the *Walker Bank* case, *supra,* this Court recited the decline of state banks because of the 1865 banknote tax, and their subsequent revival, but nevertheless recognized that congressional intent underlying the National Bank Act of 1864 was the "policy of equalization." Further, as will be noted at pp. 16-24 *infra,* Congress has continued that "policy of equalization" in subsequent amendments to the National Bank Act by specifically adopting state law as the standard for the operations of national banks in a number of important respects.

The Supervisors thus submit that *Tiffany* was erroneously decided. The words of 12 U.S.C. §85 do not say what *Tiffany* claims it says. While the legislative history is not clearly authoritative one way or the other, it certainly does not require that the words be given the substantially different meaning which the Court gave them by statutory construction (pp. 33-35 *infra*). Of pivotal significance, however, was the fact

[10] *Banking Studies, supra* note 9, at 418. (3,773 state banks to 3,759 national banks.)

that the Court was erroneously influenced by the impact of the events of 1865 and the status of the state banking system in 1873, in ascribing an entirely different legislative intent to the National Bank Act of 1864 than was in fact the case. That act, as this Court has held, embraced the "policy of equalization"—a policy Congress has implemented in numerous subsequent amendments to the Act.

The preferred lender status for national banks established by *Tiffany* has come before this Court in only five cases since 1873.[11] Usually it has been within the context of a borrower seeking a double-interest penalty from a national bank for charging the wrong rate, and the issue has been that of ascertaining the state interest rate which the national bank should have charged. Certainly there has never been a reconsideration of the essence of the Tiffany decision within the guidelines of the "policy of equalization" subsequently recognized by this Court. Nevertheless, it is significant to note that in one of the subsequent cases before this Court, Justice Pitney, joined by Justices Brandeis and Clarke, did state that ". . . the purpose of Congress was to place national banks upon *a precise equality* in this respect (interest rates) with banks of issue organized under state laws. . . ."[12] (Emphasis supplied)

[11] *Evans* v. *Nat'l. Bank of Savannah,* 251 U.S. 108 (1919); *Citizens' Nat'l. Bank of Kansas City* v. *Donnell,* 195 U.S. 369 (1904); *Daggs* v. *Phoenix Nat'l. Bank,* 177 U.S. 549 (1900); *Union Nat'l. Bank* v. *Louisville, New Albany and Chicago Rwy. Co.,* 163 U.S. 325 (1896); *Nat'l. Bank* v. *Johnson,* 104 U.S. 271 (1881).

[12] *Evans* v. *Nat'l. Bank of Savannah,* 251 U.S. 108, 117-118 (1919). It might also be noted that some lower courts, although feeling bound by *Tiffany,* have expressed wonder at the *Tiffany* decision. Thus, in *First Nat'l. Bank in Mena* v. *Nowlin,* 509 F.2d 872, 880 (8th Cir. 1975) the court pointed out that the interpreta-

This case represents the right opportunity to overrule *Tiffany*. That issue is comprised within the question of whether the rationale of *Tiffany* should be applied to interstate transactions. Sup.Ct. R. 23(1)(c).[13] Further, in the absence of "persuasive circumstances," the mere intervening silence of Congress will not prevent this Court from reconsidering an earlier decision. *Boy's Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 242 (1970). *See also Helvering* v. *Hallock*, 309 U.S. 106 (1940). This is particularly true in the instant case in view of the fact that the practical effect of the competitive inequality created by *Tiffany* has only been recently experienced, and that 12 U.S.C. § 85, as opposed to many other sections of the National Bank Act, has not been the subject of significant congressional interest.

If this Court overrules *Tiffany* and reestablishes the "policy of equalization" underlying the National Bank Act in the matter of interest rates, the holding of the Minnesota Supreme Court that principles of *Tiffany* must be extended to interstate transactions should be reversed.

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tion of the word "different" in 12 U.S.C. § 85 as "higher or lower," rather than just "higher," would have resulted in a situation in which national banks would be paired with state banks even at a different *lower* state rate than that applicable to most favored lenders.

[13] Of course, the issue of overruling *Tiffany* could not have been considered by the Minnesota Supreme Court below for it was bound by this Court's decision. Nevertheless, the lower court expressed extreme reluctance with the decision it reached in stating, "(T)he granting of a pecuniary advantage to the national banks seems inconsistent with the original purposes of the banking act and contrary to the expressed local interest of the state in protecting its citizens from excessive financing charges." Petition for Certiorari of State of Minnesota, Docket 77-1258, A-15, A-16.

II.

Even if the Court declines to overrule *Tiffany*, however, the decision below must be reversed as it, and the cases upon which it relies, have improperly interpreted 12 U.S.C. § 85 as applied to transactions by an out-of-state national bank within another state.

The Supreme Court of Minnesota reluctantly reached its conclusion below that national banks doing business in more than one state could charge either the interest rate of their home state or of the state where they were doing business, whichever was higher, on the basis of two decisions of the 7th and 8th Circuit.[14] An examination of these decisions, however, shows that Section 85 of the National Bank Act cannot support this conclusion. First, the 8th Circuit completely misread the holding of the 7th Circuit. In turn, the 7th Circuit interpreted Section 85 on the basis of interpretations of Section 94 of the National Bank Act which antedated this Court's holding regarding that section in *Citizens and Southern National Bank* v. *Bougas*, 434 U.S. 35 (1977). That holding destroys the rationale for the 7th Circuit's interpretation of Section 85.

What the 7th Circuit actually held was that a national bank doing business in more than one state was limited, with the exception to be described, to the interest rate prescribed by its home state, the only place that such bank could be "located" under 12 U.S.C. § 85. The exception permitted by the 7th Circuit was that an out-of-state national bank could charge the interest

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[14] *Fisher* v. *First Nat'l. Bank of Chicago*, 538 F.2d 1284 (7th Cir. 1976), *cert. denied* 429 U.S. 1062 (1977); *Fisher* v. *First Nat'l. Bank of Omaha*, 548 F.2d 255 (8th Cir. 1977).

rate permitted to *state banks* in the state where it was doing business if that interest rate were higher. The 7th Circuit reached this conclusion on the basis of its interpretation of the words "organized or existing" in the except clause of 12 U.S.C. § 85 referring to the interest rates permitted to state banks. The 7th Circuit was heavily influenced by what it held to be the settled interpretation of the words "located" and "established" in the venue provision of the National Bank Act, 12 U.S.C. § 94. This was, however, prior to this Court's more expansive reading of that section in *Citizens and Southern National Bank* v. *Bougas, supra.*

Clearly, in its consideration and adoption of Section 85 of the National Bank Act in 1864, Congress did not contemplate the interstate operation of national banks. The entire debate centered around the question of which rates within a state would be applicable to national banks operating in that state. No one, even the national bank proponents, contemplated that national banks would be allowed to import the interest rate of one state into another state. This not only grants national banks a further competitive superiority over state banks, but even allows an out-of-state national bank to gain a competitive advantage over an in-state national bank, as exemplified by this case. Furthermore, it destroys a state's ability to control the interest rates charged within its borders.

The unfortunate consequences of the decision below, which the Supreme Court of Minnesota recognized, but felt powerless to ameliorate because of the *Fisher* decisions, are not required by 12 U.S.C. § 85. There are at least two more rational interpretations of that section as it applies to interstate transactions, both of which

result in the conclusion that national banks should be governed by the interest rates of the states where they are doing business.

The first alternative interpretation is to assume that indeed a national bank can be "located" in only one state as the 7th Circuit assumed. Under this interpretation, it would be held that when a national bank is doing business in a state where it is not "located," Section 85 does not apply at all and the national bank is governed by the interest rate of the state where it is doing business. This was the interpretation adopted by the court in *Meadow Brook National Bank* v. *Recile,* 302 F. Supp. 62 (E.D. La. 1969).[15]

A second interpretation of Section 85, and the one urged by the Supervisors, is that a national bank doing business in more than one state is "located" in those states where it is doing business and is subject to their interest rates with respect to the business transacted within them. This interpretation of Section 85 is in accord with this Court's interpretation of the venue provision of the National Bank Act, 12 U.S.C. § 94, in *Citizens and Southern National Bank* v. *Bougas, supra,* where the Court held that a national bank can be "located" in several different places.

[15] The Supervisors recognize that an order for a new trial was granted in this case. (Brief for Respondent in Opposition to Petitions for Certiorari, p. 11). It is cited here merely to exemplify an alternative interpretation of Section 85.

ARGUMENT

I. THE 1873 DECISION OF THIS COURT IN *TIFFANY*, ESTABLISHING A PREFERRED LENDER STATUS FOR NATIONAL BANKS *VIS-A-VIS* STATE BANKS, WAS INCORRECTLY DECIDED AND SHOULD BE OVERRULED

A. *Tiffany* Is Inconsistent With Subsequent Decisions of This Court Holding That in the National Bank Act of 1864, and Subsequent Amendments Thereto, Congress Has Adopted a "Policy of Equalization" Between National and State Banks

In order to place the "policy of equalization" into perspective, a brief history of the banking system of the United States is helpful.

Until 1863 there was only a state banking system, except for the brief periods of the First (1791-1811) and Second (1816-1832) Banks of the United States.[16]

The birth of a system of national banks under the National Bank Act, originally enacted in 1863 and revised in 1864,[17] was engendered by Secretary of Treasury Salmon P. Chase in order to provide a market for government bonds, the source of funds required to finance the Civil War. The system was also designed to replace the highly diversified issues of state bank

[16] In *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) Chief Justice Marshall sustained the constitutional authority of Congress to charter the Second Bank of the United States. While recognizing that the establishment of a bank was not among the powers enumerated in the Constitution, *Id.* at 406, he enunciated the doctrine of implied powers and held that a bank could be chartered by Congress as a financial agent of the federal government to assist in the implementation of the federal government's fiscal powers which were specifically granted to Congress by the Constitution.

[17] Act of Feb. 25, 1863, ch. 58, 12 Stat. 665; Act of June 3, 1864, ch. 106, 13 Stat. 108.

notes by a sound currency circulating at uniform value throughout the country.[18]

Other than with regard to the issuance of currency, however, it was not contemplated that national banks would operate much differently from state banks. Indeed, the organization of banks under the National Bank Act followed the pattern of the laws of New York, Ohio, and other states, except that certification was required from a federal official, the Comptroller of the Currency who was the head of a newly created Bureau in the Treasury Department.[19]

It was expected that state banks would be attracted to the national banking system and provisions were included in the Act whereby state banks could easily convert to national banks. The anticipated conversions, however, did not take place and as of the end of 1864 there were still only 467 national banks as compared to 1,089 state banks. Frustrated in its effort to adopt a uniform currency, Congress, by a statute in 1865, reenacted in 1866,[20] imposed a tax of 10 per cent on the circulating notes of state banks. While this ended state bank note circulation, it did not end the state bank system which, after a period of decline in numbers, received new vitality from the growth and profitability of deposit banking. By 1892 there were more state than national banks, and state banks have outnumbered national banks since that time.[21]

[18] *Banking Studies, supra,* note 9 at 43-44 and other authorities cited in that note.

[19] *Id.* at 45.

[20] Act of Mar. 3, 1865, ch. 78, 13 Stat. 484; Act of July 13, 1866, ch. 184, 14 Stat. 146.

[21] *Banking Studies, supra* note 9, at 45-46, 418.

Subsequent congressional legislation made significant changes in the banking system of the United States. The adoption of the elaborate system of monetary controls in the Federal Reserve Act of 1913, and the retirement of notes issued by the national banks in 1935, diminished to the point of extinction whatever special role national banks may have once played as federal instrumentalities in the fiscal operations of the Government.[22] More importantly, the Congress set out to strengthen the authority of national banks which now found themselves at a competitive disadvantage with state banks by reason of the adoption of modern banking codes by many of the States. Congress did so by specifically adopting *state* law as the measure of the authority of national banks in several significant

[22] A cogent marshalling of facts supporting this conclusion is to be found in the dissenting opinion in *First Agricultural Nat'l. Bank* v. *State Tax Comm'n.*, 392 U.S. 339 (1968), finding that national banks are no longer federal instrumentalities (an issue which the majority did not find necessary to reach to decide the case.) The dissent noted that "national banks under Civil War legislation, to which national banks today trace their history, had important and significant functions concerning currency. . . . All of this was radically changed with the passage of the Federal Reserve Act of 1913, 38 Stat. 251, as amended, 12 U.S.C. § 221 *et seq.* and by subsequent developments with respect to both the Federal Reserve System and to national banks. To capsulize those developments greatly, suffice it to say that the Federal Reserve banks (and System) are now the monetary and fiscal agents of the United States. 12 U.S.C. § 391. By 1935, the power of national banks to issue currency had ceased and now Federal Reserve banks are the only banking institutions that can do so." 392 U.S. at 356. The dissent concluded: "Today the national banks perform no significant fiscal services to the Federal Government not performed by their state competitors." *Id.* at 358.

areas of bank operations.[23] In speaking of this development, this Court recently stated:

> The policy of competitive equality is therefore firmly embedded in the statutes governing the national banking system. The mechanism of referring to state law is simply one designed to implement that congressional intent and to build into the federal statute a self-executing provision to accommodate to changes in state regulation.

First National Bank of Plant City v. *Dickinson,* 396 U.S. 122, 133 (1969).

Congressional intent to achieve competitive equality between state and national banks, or the policy of equalization, has been implemented by this Court in three ways.

First, this Court has held that Congress refrained from occupying the field to permit the application of state laws which do not conflict with federal law appli-

[23] Some of the significant instances of the specific adoption of state law in the National Bank Act are as follows: (a) *Branches.* Section 36(c) adopts state law as the standard for the establishment of branches by national banks. 44 Stat. 1228-29 (1927), *as amended* 12 U.S.C. § 36(c) (1976). (b) *Capitalization.* In certain instances state law is the measure of allowable capitalization of new national banks. 48 Stat. 185 (1933), 12 U.S.C. § 51 (1976). (c) *Conversions and Mergers.* No conversion of a national bank to a state bank, or its merger with a state bank, may take place "in contravention of the laws of the State in which the national banking association is located." 64 Stat. 456 (1950), 12 U.S.C. § 214(c) (1976). (d) *Fiduciary Powers.* The Comptroller may grant a permit to national banks, "when not in contravention of State or local law," to "act as trustee . . . or in any other fiduciary capacity in which State banks . . . which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 76 Stat. 668 (1962), 12 U.S.C. § 92 (a) (1976). See also the reservation of powers over bank holding companies and bank subsidiaries. 70 Stat. 138 (1956) 12 U.S.C. § 1846 (1964).

cable to national banks. Thus, in *First National Bank in St. Louis* v. *Missouri,* 263 U.S. 640 (1924), this Court held—at a time prior to the passage of Section 36(c) of the National Bank Act authorizing national banks to branch—that a Missouri statute forbidding branch banks was applicable to national banks. Mr. Justice Brandeis in *Lewis* v. *Fidelity and Deposit Co. of Maryland,* 292 U.S. 559, 566 (1934), reiterated this conclusion in holding that "... a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law."

Second, in construing provisions of federal law applicable to national banks which give deference to state law, this Court has construed the federal statute in a manner designed to assure *full* competitive equality with state banks. Thus, in *Lewis* v. *Fidelity and Deposit Co. of Maryland, supra,* the question was whether a 1930 amendment to the National Bank Act authorizing a national bank to "give security" for state deposits meant merely a pledge of specific assets or a general lien upon the bank's assets. State banks, competitors of national banks for such deposits, had the right to give the more impressive security of a general lien. This Court held that the language of the federal statute was broad enough to authorize a general lien, and that it should be given that construction because "the main purpose of the 1930 Act was to equalize the position of national and state banks . . . ." *Id.* at 564. Mr. Justice Brandeis concluded as follows:

> The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. (Citations omitted)

Id. 564-565.

Finally, just as the Court has construed provisions of the National Bank Act to assure that national banks would compete fully with state banks, it has construed provisions of the Act in order to assure that *state* banks could also compete fully with national banks. Two important cases involving branching exemplify this point.

In the *Walker Bank* case, *supra,* this Court was called upon to construe Section 36(c) of the National Bank Act, enacted by the McFadden Act of 1927 and the Banking Act of 1933 in order to place national banks on a parity with state banks in the matter of branching. The Court was emphatic in its statement that Congress had intentionally sought to maintain "competitive equality" in branch banking by incorporating state law in the National Bank Act as the standard by which national banks could branch. It went on to state that *all* provisions of state branching law are binding upon national bank branches, and that the Comptroller may not "pick and choose what portion of the law binds him" in authorizing national bank branches. 385 U.S. at 261. This result, the Court concluded, was in accordance with the "policy of equalization first adopted in the National Bank Act of 1864." *Id.*

Similarly, in construing the provisions of Section 36(f) of the Act defining a "branch," this Court in *Dickinson, supra,* stated that the definition "must not

be given a restrictive meaning which would frustrate the congressional intent this Court found to be plain in *Walker Bank.*" 396 U.S. at 134.

In both *Walker Bank* and *Dickinson,* the Court emphasized the obvious point that it was not called upon to judge the "rightness" or "wrongness" of the banking policies involved. In *Dickinson* it pointed out that many would consider armored car service and deposit receptacles to be a sensible mode of operations, 396 U.S. at 138. But it said in *Dickinson,* for example, that "*Florida's* policy" of restricting armored car service "is not open to judicial review any more than is the congressional policy of 'competitive equality.'" *Id.* (Emphasis supplied.)

It is in the light of the foregoing history of banking and of the banking statutes of the United States, as well as this Court's construction of those statutes in accordance with the policy of equalization, that *Tiffany* must be reexamined. It stands completely isolated in permitting a national bank to charge the highest rate available to any lender in the state, even if state banks are limited to a lower rate. *Tiffany* also stands in distinct opposition to the "policy of equalization" by forcing a state either to permit state banks to charge the highest interest rates of any lender in the state in order that they may compete with national banks, or alternatively, to permit non-bank institutions to charge higher rates in order to develop specialized lending activities at the expense of creating competitive inequity between state and national banks. In almost every other area of banking operations, competitive equality is achieved by requiring national banks to follow *state* policy applicable to *state* banks reflected in *state* law.

When the *Tiffany* Court stated that 12 U.S.C. § 85 was intended to give national banks "at least equal advantages in such competition" with state banks, 85 U.S. at 412, it was on sound ground under the "policy of equalization" and should have stopped there. It went on, however, to speculate that an "unfriendly state might prescribe a rate for state banks so low, that banking could not be carried on by national banks except at a loss." *Id.* Just why states would try to put state banks out of business by a ruinously low interest rate in order to put national banks out of business, is *never* explained or supported in the Court's opinion. Nevertheless, the Court said, national banks must be assured the higher of both state bank and other-than-state-bank rates even if the end result is to permit a national bank a higher rate than a state bank. This result, the Court concluded, was justified because "it accords with the spirit of *all* of the legislation of Congress" (emphasis supplied) which, among other things, has substantially taxed state banks out of existence. It was to exercise "harmony" with this policy of the state banknote tax of 1865 that the *Tiffany* court adopted the preferred lender status which it granted national banks under Section 85 of the National Bank Act of 1864. In that conclusion, constituting the pivotal decisional criteria of the case, the *Tiffany* court erred.[24]

[24] The cases subsequently applying the *Tiffany* doctrine demonstrate the competitive superiority that can result to national banks. Normally, the interest rates applicable to national bank loans must be those applicable to comparable loans under state law although the terms and conditions of the loans need not be identical. *Partain v. First Nat'l. Bank of Montgomery,* 336 F. Supp. 65 (M.D. Ala. 1971), *rev'd on other grounds* 467 F.2d 167 (5th Cir. 1972). For example, in *United Missouri Bank of Kansas City v. Danforth,*

Having established that the *Tiffany* decision was contrary to the underlying intent of Congress to establish a "policy of equalization" in the National Bank Act, attention should now be turned to the specific legislative history of 12 U.S.C. § 85.

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394 F. Supp. 774 (W.D. Mo., 1975), the court held that a national bank could charge the interest rate permitted by the state's Small Loan Act for its credit card transactions, even though the court assumed that such transactions were of a type subject to the state's Retail Credit Sales Act. *See also Acker* v. *Provident Nat'l. Bank,* 512 F.2d 729 (3rd Cir. 1975) and *Haas* v. *Pittsburgh Nat'l. Bank,* 526 F.2d 1083 (3rd Cir. 1975).

In *Northway Lanes* v. *Hackley Union Nat'l. Bank & Trust Co.,* 464 F.2d 855 (6th Cir. 1972), the court held that a national bank could take interest in advance and charge the borrower closing expenses even though under similar circumstances a state bank would be prohibited from doing so. In *Evans* v. *Nat'l. Bank of Savannah,* 251 U.S. 108 (1919), this Court held that a national bank in discounting short-time notes in the ordinary course of business may retain an advance charge at the highest rate allowed for interest by state law even though such advance taking would be usurious under state law. The majority claimed that the National Bank Act had adopted state law only insofar as it fixed a numerical rate of interest. In *Citizens' Nat'l. Bank of Kansas City* v. *Donnell,* 195 U.S. 369 (1904), however, this Court had held that a national bank which compounds interest in a manner prohibited by the state where it does business forfeits all interest even though the total interest charged amounted to less than the maximum rate permitted by the state. Moreover, in *First Nat'l. Bank in Mena* v. *Nowlin,* 509 F.2d 872 (8th Cir. 1975), the court held that if discounted notes issued by a national bank yielded in excess of the interest rate permitted by Arkansas law, even though the numerical rate was not in excess, this was a usurious rate. The court held that the primary principle of construction of Section 85 is that it adopts the entire case law of the state interpreting the state's limitation on usury and not just the state's numerical rate. The court read *Evans* as a narrow exception to this interpretation for short-term single payment commercial paper.

B. Neither the Language of Section 85 Nor the Intent of Congress in Adopting It Require the Result Reached in *Tiffany*

1. In its initial consideration of the predecessor of Secton 85, the House of Representatives refused to authorize national banks to charge the interest rates permitted to any lender

In 1864, the House Ways and Means Committee reported a bill which would have replaced Section 46 of the National Currency Act of 1863[25] with a new Section 30 establishing a uniform interest limitation of seven per cent for national banks.[26] On March 30, 1864, Congressman Blaine of Maine moved to amend the committee proposal "by striking out the words 'of seven per cent per annum,' and inserting in lieu thereof the words 'established by law in the State where the association is located.' "[27] This reference to the rate *established* by the state where the national bank was located was supported by Congressman Cole of California.[28]

Congressman Price proceeded to offer another amendment which would have pegged the interest rate at "the established rate of interest for delay in the payment of money under contract between the parties

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[25] "That every association may take, reserve, receive, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, such rate of interest or discount as is for the time the established rate of interest for delay in the payment of money, in the absence of contract between the parties, by the laws of the several States." Act of Feb. 25, 1863, ch. 58, § 46, 12 Stat. 678-79. There does not appear to be any enlightening legislative history on this specific provision.

[26] *Cong. Globe,* 38th Cong., 1st Sess. 1352, 2123 (1864).

[27] *Id.* at 1352.

[28] *Id.* at 1353 (Emphasis added.)

by the laws of the several States in which the associations are respectively located, and no more.'"[29] The House rejected the Price amendment after Congressman Blaine pointed out that the effect would be to give the national banks an advantage by permitting them to charge the same rates as individuals:

> I would be opposed especially to [Congress's] interfering so as to raise the rate of interest; and if the gentleman's amendment is adopted, the effect will be that every bank in the Northwest will have just the same facilities for shaving at high rates that individuals *outside the banks* now have. I do not think the Congress of the United States ought to do that thing, and hence I am opposed to the amendment.[30]

The House approved the Blaine amendment, 52 to 41. Further debate then ensued on reconciling the penalty provision of the act with this revised interest rate provision and a proposal of Congressman Blaine in this regard was adopted.[31] Thus, the House refused to adopt a uniform national rate of interest for national banks. It also clearly refused to allow national banks to charge the rate permitted to any lender by the state. It appeared to assume that the provision it did pass would only allow national banks to charge the rate permitted to other banks by the state. These views of the House are significant in understanding the Senate version of Section 30 in which the House later concurred without debate.[32] If

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[29] *Id.* at 1352.

[30] *Id.* (Emphasis added.)

[31] *Id.* at 1353-1354.

[32] *Id.* at 2450.

that section permitted national banks to charge the interest rate permitted to any lender, it seems doubtful that the House would have concurred in it without debate since the House had specifically refused to adopt such a measure.

2. The Senate compromise on the interest rate provision of the National Bank Act sought to assure that state banks would not be favored by the States: the intent was not to give national banks competitive advantages

On May 5, 1864, the Senate commenced debate on the interest rate provision reported by the Senate Finance Committee as follows:

> The rate allowed by the laws of the State or Territory where the bank is located, and no more. And when no rate is fixed by the laws of the State or Territory, the banks may take, receive, reserve, or charge a rate not exceeding seven per cent.[33]

Senators Grimes of Iowa, Henderson of Missouri, and Doolittle of Wisconsin led the faction which sought to prevent national banks from gaining a competitive advantage over state banks by being able to charge higher interest rates. Consequently, Senator Grimes proposed an alternative amendment, setting interest at "the general rate fixed by the laws of the State or territory where the bank is located." He felt that the deletion of the word "allowed" was necessary to prevent national banks from being able to charge at the rate set by contract between private individuals, when that percentage exceeded the general rate for local banks.[34] He presupposed a rate structure in which the state set a

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[33] *Id.* at 2123.

[34] *Id.* at 2124.

general rate with certain limited exceptions, such as for individual transactions. The former rate would be the "established" rate and the latter would be a rate which the state "allowed".

Senator Sherman, a proponent of the national banks, commented that he did not see why privileges of state banks should not also be extended to national banks:

> The reason why I am opposed to the amendment of the Senator from Iowa is that if adopted it will continue in existence the State banks that are entitled to the special privilege of taking a *greater* rate of interest than will be conferred by the general law on the national banks.[35]

Thus, the leader of the national bank forces in this instance was concerned with competitive equality with state banks, not competitive superiority. In his opinion, the bill proposed by the Committee on Finance would have the same legal effect as the clause in the 1863 Act referring to the "established rate of interest." Senator Grimes countered that if the term "allowed" was used, a national bank, in Iowa for example, could charge ten per cent since that rate was "allowed" for individuals entering into a private contract, but the "established" rate of interest applicable to local banks was six per cent. Since in Senator Sherman's view there was *no difference* between the legal definitions of "allowed" and "established," he readily agreed to compromise with Grimes by substituting "established" for "allowed." Grimes withdrew his amendment, and the Senate agreed upon Sherman's

[35] *Id.* (Emphasis added.)

amendment to the Finance Committee proposal.[36] Thus, the provision then read in pertinent part:

> That every association may take . . . interest at the rate established by the laws of the State or Territory where the bank is located, and no more.

Senator Henderson wanted to know what would be the rate of interest charged *in the state of Missouri* by the national banks in light of this amendment. Did the "rate established" by the laws of the State refer to the six per cent figure which prevailed in the absence of any agreement, the eight per cent rate to which banks of issue were limited, or the ten per cent limit which controlled transactions between private individuals? Henderson urged a modification of the language to read, "the rate established[37] to be charged by banks of issue under the laws of the State or Territory where the bank is located, and no more." He sought "to allow [national] banks to charge *just exactly* what other banks of issue in the State charge. *I do not want to make any difference between them."* To cover the case in which the State has no banks of issue, he included the following language in his amendment:

> And when no such rate of interest is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding the rate allowed upon special contract between individuals.[38]

[36] *Id.* at 2125.

[37] Although Henderson at first proposed the use of the word "allowed," the amendment as read by the Secretary said "established." *Id.* at 2125-26.

[38] *Id.* at 2126.

Senator Sherman once again voiced his support for the original amendment reported by the Committee. That bill "was intended to confer on these national banks the same privileges that are conferred by the laws of the States on other associations and individuals," and it would "allow those national banks the same rate of interest as is provided for by the local law for the people within their own States." The states could change their laws at any time if they chose. Although Sherman had preferred a uniform rate of interest, he was willing now "to place the national banks in each State on precisely the same footing with individuals and persons doing business in the State by its laws." He announced his intention to move to reconsider the vote on the Grimes amendment.[39]

Senator Grimes was indignant. He retorted that in order to rectify the affront to Iowa state policy that passage of the original bill would represent, a special convening of the legislature, at great expense, would be necessary. In exchange for Sherman's withdrawal of his motion to reconsider the amendment by which "established" had been inserted in place of "allowed," Senator Grimes offered to vote against all the subsequent propositions. Senator Sherman agreed, repeating his opinion that "established" and "allowed" had "precisely the same" legal effect.[40]

After further debate, Senator Fessenden suggested that Congress pass over the amendment for the time being, in the hope that the language might be revised to resolve some of the difficulties which had arisen. But Senator Conness urged that the vote by which "established" had been inserted in place of "allowed" be reconsidered then and there, so that the amendment would stand as it had come from committee. Congress approved the motion to reconsider, so the amendment remained in its original form until Congress could return to it.[41]

[39] *Id.*

[40] *Id.* at 2126-27.

On May 7, 1864, the Senate approved without discussion a compromise amendment setting as the interest limitation:

> That every association may take . . . interest at the rate *established* by the laws of the State or Territory where the bank is located, and no more, *except that where by the laws of any State a different rate is limited for banks of issue organized under State law, the rate so limited shall be allowed for associations organized in any such State under this act.* And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per cent.[42]

When the House took the amendment up for consideration on May 24, the first line included the word "allowed" rather than "established" without any explanation being given for the difference. By a vote of 67-52, the House approved the amendment without modification [43] and it became law in that form.

The section has undergone various revisions since its 1864 enactment. These revisions occurred in 1878, 1933, 1935, and 1974. They are discussed in more detail

[41] *Id.* at 2127-28.

[42] *Id.* at 2145. (Emphasis added.)

[43] *Id.* at 2450.

later in the brief.[44] Section 85 currently reads as set forth in Appendix D.

The legislative history of Section 85 has been the subject of an extensive comment in the Iowa Law Review.[45] That author concludes that the *Tiffany* court misinterpreted the intent of Congress:

> The second possible construction is that when the provision refers to a "different" rate limited to state banks ,the Senators intended that national banks also be limited to that "different" rate *and* that they would be so limited whether that rate was *higher* or *lower* than the general rate under state law. This construction of the phrase resembles a genuine compromise. Because national banks could charge the "different" (higher) state bank rate, a state would be unable to discriminate against national banks by having a general rate, purporting to bind national banks, lower than the state bank rate. By the same token, national banks would be denied the advantage of charging a high general rate, or even a high rate "allowed" to some specific group or institution other than state banks, if the state bank were lower, because they would be required to charge the "different" (lower) state bank rate. Thus, the primary objectives of both factions were achieved. State legislatures were precluded from discriminating against national banks, and in no case could national banks charge a higher rate than state banks. Moreover, this construction of section 30 has the manifold advantages of comporting with the realities in the historical record, resting on the most natural interpretation of the words in the statute, and conforming with the compromise which must have been intended.[46]

[44] *See* note 55, *infra*.

[45] Comment, *National and State Bank Interest Rates Under the National Bank Act: Preference or Parity?* 58 *Iowa L. Rev.* 1250 (1973).

Since the House plainly did not desire to permit national banks to charge the rate permitted to any lender, since a strong Senate faction clearly wanted the national banks limited to the state bank rate, and since one of the main concerns of the Senate supporters of the national banks was that they not be competitively disadvantaged *vis-a-vis* state banks, the Supervisors concur in the above interpretation of the Congressional intent in adopting the predecessor of Section 85. Moreover, this interpretation more nearly comports with the statutory language itself than the interpretation adopted by the *Tiffany* court.

3. A fair reading of Section 85 supports an interpretation that Congress intended only that national banks have competitive equality with State banks

It is clear from the foregoing legislative history that Congress did not intend to set nationwide uniform interest rates for national banks and did not do so. Congress recognized that this would prohibit states from controlling interest rates within their boundaries. Further, if in certain areas higher interest rates prevailed, national banks would be precluded from doing business in those areas because it might not be profitable to operate at the lower national rate. Secondly, it is clear that Congress wished to insure that state banks did not have competitive superiority over national banks. The legislative history is less clear, however, on the intent of Congress to limit national

[46] *Id.* at 1257.

banks to the rates permitted to state banks. To permit otherwise, however, is contrary to the policy of equalization underlying the National Bank Act which has been held to govern the relationship between state and national banks. Moreover, the statutory language has to be distorted in order to reach a determination that national banks are not limited to the same interest rates as state banks.

The "except" clause in Section 85 has no purpose if it does not limit national banks to the rates permitted to state banks. The first sentence of Section 85 alone is entirely adequate to permit national banks to match any rate permitted by a state to its lenders, including state banks. The "except" clause must have been intended to limit national banks to any "different rate" permitted to state banks.[47] Under this interpretation, it is not necessary to distort the plain meaning of the word "different," as the Court in *Tiffany* did, by holding that "different" only means "higher". The Court's interpretation also renders the "except" clause superfluous since, by virtue of the first sentence of Section 85, a national bank could match any rate of any lender in the state, including state banks. The obvious purpose of the "except" clause is to *limit* national banks to the rates permitted to state banks if those rates are "different" from those permitted to other lenders. Unless the second clause *restricts* the national banks to the "different" rate of the state banks, even if lower, the phrase is redundant, for under the first clause any rate "allowed" under the laws of the state

[47] There was no debate on the critical "except" proviso, which appeared for the first time in the final version approved by Congress.

would include any rate "allowed" for state banks. The *Tiffany* case requires "different" to be read as "higher," with the "except" clause becoming superfluous. *Tiffany* should be overruled and the principle of competitive equality for national and state banks in the area of interest rates restored.

C. In the Absence of "Persuasive Circumstances" Not Here Present, the Mere Silence of Congress Concerning *Tiffany* Will Not Prevent This Court From Overruling That Case

The immediately preceding sections of this brief have established the incorrectness of the *Tiffany* decision in terms of the "policy of equalization" underlying the National Bank Act (pp. 16-24), the legislative history of 12 U.S.C. § 85 itself (pp. 25-33), and a reasonable construction of the specific words of that provision (pp. 33-35).

The question arises, therefore, as to why there was not an effort to secure congressional reversal of a manifestly unfair and incorrect decision. The answer is that the preferred lender status accorded to national banks by *Tiffany* did not have a significant business impact on state banks until relatively recently.[48] The reasons why this was so lie in a complex interplay of newly developed forms of credit, financial institutions, patterns of competition, and relationships between usury ceilings and interest rates generated by the market place. Essentially, however, the explanation lies in the fact that while state usury laws were sim-

[48] One indication of this fact is that there has probably been more litigation in the past 10 years relating to 12 U.S.C. § 85 than in the preceding several decades. *See* 12 U.S.C.A. § 85 and cases cited there.

plistic at the time of *Tiffany,*[49] they became enormously complex as states selectively increased rate ceilings in an effort to regulate consumer credit.[50] This was so primarily in the high-risk, small loan area,[51] a credit

[49] Laws regulating interest rates in the United States have typically been established by state governments which inherited usury rate ceilings from the British Colonial days. *See generally,* National Commission on Consumer Finance, *Consumer Credit in the United States ("NCCF Report")* Ch. 6 (1972); S. Homer, *A History of Interest Rates* (1963).

[50] The *NCCF Report* at 94, using New York as an example, shows the multiplicity of usury laws:

> New York has separate statutes regulating instalment loans by commercial banks, loans by industrial banks, bank check-credit plans, revolving charge accounts, motor vehicle instalment sales financing, instalment financing of other goods and services, insurance premium financing, loans by consumer finance companies, and loans by credit unions. The general usury rate is 6 percent, (currently 7½ percent under special rule of the Banking Board), and criminal penalties apply if interest is over 25 percent. But the decreed maximum rates to obtain $500 of credit, repayable monthly over 12 months, range widely: bank personal and improvement loans, 11.6 percent; industrial banks, 14.5 percent; used cars up to 2 years old, 17.7 percent; used cars over 2 years old, 23.2 percent; small loan companies, 24.8 percent; other goods, 18.0 percent; retail revolving credit 1½ percent on monthly balances up to $500 and 1 percent monthly on balances in excess of $500.

Citations omitted. *See also* Appendices B and C, which set forth state law on just two of many possible examples (consumer or installment loans up to $1000, and on any type of loan at selected levels of $300 and $1000).

[51] The first modern small loan bill was passed in New Jersey in 1914 and such legislation eventually passed in most of the 50 states. *NCCF Report* at 93. These acts represented the legislative response to the problem of loan sharks and were an effort to replace them with "legitimate" lenders. By raising permissible maximum rates, the legislatures attempted to provide legitimate lenders with the opportunity of making a reasonable profit for the extension of small loans to poor credit risks. Note, *Regulation of Consumer Credit—The Credit Card and the State Legislature,* 73 *Yale L.J.* 886, 898

field into which banks did not enter for a long time.[52] It was only then that the rate differential for banks and non-banks (which national banks could utilize) could become significant, and did in fact become so as banks, pressed by increased competition and inflationary interest rates bumping interest ceilings, reached out for higher rate opportunities. This is one reason, for example, why banks have been attracted to the recent credit card phenomenon[53] where the consumer appears to pay relatively little attention to the level of interest rates and gives primary weight to service convenience.[54]

(1964). It should be noted, however, that not just consumers were considered in enacting exceptions to usury laws. A host of exceptions to the usury laws were made to accommodate the needs of industry and commerce as well. *NCCF Report* at 93.

[52] Thus the National City Bank in New York was the first to organize a personal loan department and this was not until 1928. *NCCF Report* at 93; Kawaja, *The Economics of Statutory Ceilings on Consumer Charges, 5 Western Econ. J.* 157, 161 (1967).

[53] Credit cards were first issued by individual department stores and petroleum companies as sales devices. The Diners' Club card in 1950 was the first issued as an independent source of profit. The coupling of the convenience aspect of monthly billing with a form of installment finance, and the entry of banks into the credit card industry, came later. Note, *supra* note 51, at 73 *Yale L.J.* 886-89.

[54] This is true even after the passage of the Truth in Lending Act of 1968, 15 U.S.C. § 1601 *et seq. See* Giles, *The Effect of Usury Law in the Credit Market Place.* 95 *Banking L.J.* 527, 534-536 (1978), and sources cited. *NCCF Report, supra* note 49, at 191. See also the decision of the court below. (A-35 attached to the petition for certiorari of the State of Minnesota in Docket 77-1258). This is part of a larger phenomenon whereby borrowers generally do not "shop" for loans, although consumers generally do shop for goods. Note, *supra* note 51, at 73 *Yale L.J.* 892-94. It should also be noted that the cost of credit in credit cards is very high, *id.* at 899, and, therefore, requires a higher rate of interest to achieve creditor profitability.

Because the preferred lender status accorded national banks by *Tiffany* did not become a problem until recently, it is understandable why little or no attention has been paid by Congress to the issue of competitive inequality between state and national banks in 12 U.S.C. § 85. Indeed, to the extent any implications can be drawn from that subsequent history, it supports the view that Congress itself did not read 12 U.S.C. § 85 as *Tiffany* read it.[55] In any event, congressional silence is no bar to a reconsideration of the *Tiffany* construction of 12 U.S.C. § 85. In *Helvering* v. *Hallock,* 309 U.S. 106 (1940), overruling a prior interpretation of an estate tax provision, Mr. Justice Frankfurter commented extensively on the danger of relying too heavily upon the absence of correcting legislation:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision . . . .
>
> . . . Our problem then is not that of rejecting a settled statutory construction. The real problem is whether a principle shall prevail over its later misapplications.

309 U.S. at 119-20, 122.

Justice Frankfurter also observed that the fact that Congress had amended *other* provisions of the estate tax law in response to Court decisions did not imply the acceptance of the cases which *Hallock* overruled. 309 U.S. at 120, n.7.

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[55] 12 U.S.C. § 85 has been amended only four times since its original enactment in 1864.

In Section 5197 of the Revised Statutes of 1878, the words "or existing" were added to the except clause. This change, which did not affect intra-state competitive equality between state and national banks, has no legislative history.

In 1933, the "1 per centum" in excess of the Federal Reserve discount rate language was added to the first and second sentences. Act of June 16, 1933, ch. 89, §25, 48 Stat. 191. This language was contained in the original bill drafted by Senator Glass in 1932. S. 4412, 72nd Cong., 1st Sess. § 21 (1932). The clause was explained in the Senate Committee Report as follows: This section "limits the interest that may be charged by a national bank *to that which may be charged by local banks* in the State where the national bank is located, or to a rate 1 per cent higher than the discount rate on 90-day commercial paper in effect at the Federal reserve bank in the district where the national bank is located, whichever is greater." *S. Rep. No.* 584, 72nd Cong., 1st Sess. 16 (1932). (emphasis added). The same explanation appeared in the House and Senate Committee reports in 1933, *H.R. Rep. No.* 150, 73rd Cong., 1st Sess. 4 (1933); *S. Rep. No.* 77, 73rd Cong., 1st Sess. 17 (1933). There was almost no legislative debate over this provision. *See* 77 Cong. Rec. 3944 (1933). Thus, in 1933 the Congress considered the *only* exception to the applicability of the state *bank* rate to national banks to be the 1 per cent add-on to the discount rate, an instrument of monetary control. That exception seldom, if ever, has been the effective limit because of the consistently low level at which the discount rate has been set. *Banking Studies, supra* note 9, at 454-458.

In 1935, Congress added the third sentence to 12 U.S.C. § 85. Act of Aug. 25, 1935, ch. 614, § 314, 49 Stat. 711. As described by the House Committee report, this addition would "permit national bank branches located outside the States of the United States and the District of Columbia to charge interest at the rate permitted by local law." *H.R. Rep. No.* 742, 74th Cong., 1st Sess. 19 (1935).

In 1974, the clause "or in the case of business or agricultural loans . . . where the bank is located", was added to the first and second sentences of Section 85 to meet an emergency situation affecting three states. Act of Oct. 29, 1974, Pub. L. 93-501, Title II, § 201, 88 Stat. 1558. This exception is not applicable to loans made after July 1, 1977 and was subject to being overridden by subsequent state laws. *S. Rep. No.* 93-1120, 93rd Cong., 2nd Sess. (1974), reprinted in [1974] *U. S. Code Cong. & Ad. News* 6249, 6261.

The Court has often cited *Hallock* with approval when it has reconsidered a previous statutory interpretation despite the failure of Congress to modify the statute in question. In *Girouard* v. *United States,* 328 U.S. 61 (1946), the Court overruled several earlier cases which had said that an alien who refuses to bear arms would not be admitted to citizenship. Even though many efforts to amend the result of the prior cases had died in committee, and Congress had reenacted the applicable statute, the majority declined to infer that Congress had adopted the discredited interpretation:

> It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.

328 U.S. at 69-70.

See also Boy's Markets, Inc. v. *Retail Clerks Union,* 398 U.S. 235 (1970) (Norris-LaGuardia Act does not bar granting of injunctive relief, overruling *Sinclair Refining Co.* v. *Atkinson,* 370 U.S. 195 (1962); no persuasive circumstances existed to show that legislative inaction was an acceptance of *Sinclair*); *James* v. *United States,* 366 U.S. 213 (1961) (embezzled money is taxable income under the Internal Revenue Code, overruling *Commissioner* v. *Wilcox,* 327 U.S. 404 (1946); fact that Congress has remained silent, has reenacted a statute construed by the Court, or has unsuccessfully attempted to amend a statute does not preclude Court from correcting its own errors); *Commissioner* v. *Estate of Church,* 335 U.S. 632 (1949) (*May* v. *Heiner,* 281 U.S. 238 (1930), no longer controlling on interpretation of "possession or enjoyment" pro-

vision of § 811(c) of Internal Revenue Code; Congress had not ratified earlier ruling); *Wong Yang Sung* v. *McGrath,* 339 U.S. 33, 47-48 (1950); *FTC* v. *Dean Foods Co.,* 384 U.S. 597, 609-10 (1966); *Helvering* v. *Reynolds,* 313 U.S. 428, 432 (1941).

When the Court has occasionally relied on the absence of congressional action to support its reaffirmation of a prior decision, persuasive circumstances, not here involved, were present. Thus, in *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339 (1968), the Court held that under 12 U.S.C. § 548 national banks were not subject to the Massachusetts sales tax. Mr. Justice Black stressed that the legislative history of the provision clearly indicated that the statute was intended to prescribe the only way in which states could tax national banks, 392 U.S. at 342-43, and that since the enactment of the statute, Congress had frequently amended § 548 in response to new problems. 392 U.S. at 345-46.[56]

For the reasons set forth above, the Supervisors respectfully request this Court to overrule *Tiffany* and hence to reverse the decision of the court below which, ultimately, rests upon *Tiffany.* In the event this Court declines to overrule *Tiffany,* however, the court below should be reversed for other reasons, as will now be shown.

[56] Even with these persuasive circumstances, three of the eight participating justices would have nevertheless overruled the doctrine that national banks were "federal instrumentalities" in the light of radical changes in the banking industry since the National Bank Act. *See* note 22 *supra.*

II. REGARDLESS OF WHETHER *TIFFANY* IS OVERRULED, NEITHER IT NOR SECTION 85 PROVIDES A BASIS FOR ALLOWING NATIONAL BANKS TO CHARGE INTEREST RATES NOT PERMITTED BY THE LAW OF THE STATE WHERE THEY ARE DOING BUSINESS

The Supreme Court of Minnesota, in a reluctant decision which it felt compelled to reach on the basis of prior decisions of the 7th and 8th Circuit Courts of Appeal, held below that national banks doing business in more than one state could apply the interest rates of their home state or the interest rates of the state where they were doing business, whichever were higher, to transactions in the latter state. This holding is not in accord with the language of Section 85, is not supported by the legislative history and purpose of that section, and is contrary to the principle of competitive equality which has been held to govern the relationship between state and national banks. It further improperly extends the competitive advantage which national banks already enjoy over state banks in the area of interest rates.

A. The Seventh Circuit *Fisher* Case Reached Its Conclusion Allowing the Interstate Exportation of Interest Rates Largely on the Basis of Prior Constructions of the Venue Provision of the National Bank Act Which Predated This Court's Holding in *Citizens and Southern National Bank* v. *Bougas*

In *Fisher* v. *First National Bank of Chicago,* 538 F.2d 1284 (7th Cir. 1976), *cert. denied* 429 U.S. 1062 (1977), the issue was whether the interest rate charged by a national bank, with its principal place of business in Chicago, in connection with the use of its bank credit cards by customers in Iowa was governed by the 18% rate fixed by the Illinois Revolving Credit Act, by the 18% rate fixed for Iowa Small Loan Companies, by the 12% rate fixed for Iowa state banks, or by the 9% rate fixed for persons generally in Iowa. The credit card business was conducted in Iowa with the help of Iowa correspondent state banks.

The District Court in *Fisher* had held that Section 85 did not apply to loans made to borrowers situated in states other than where the national bank is located and that the laws of the state in which the borrower is located applied in such situations—in this case the Iowa 18% rate.

The Court of Appeals held that, based on the first portion of Section 85, the national bank was "located" only in Illinois and that Illinois law governed the rate the bank could charge within Illinois and anywhere else that it might do business. The court felt compelled to reach this conclusion on the basis of previous cases construing "located" and "established" in the venue provision of the National Bank Act, 12 U.S.C. § 94, in a narrow fashion. The court stated:

> From our prior discussion in Part II of 12 U.S.C. § 94, the national banking association venue provision, and the *Radzanower* case, there can certainly be no lingering doubt as to the meaning of "where the bank is located." None of the cases indicate that Congress gave one meaning to "locate" in § 94 and another meaning to the same word in § 85. The defendant here is located, established and organized in only Chicago, Illinois, and is subject therefore to the rate of interest "allowed by the laws of the State" of Illinois.

538 F.2d at 1289.

Subsequently, however, this Court in *Citizens and Southern National Bank* v. *Bougas,* 434 US 35 (1977) has given 12 U.S.C. § 94 a more expansive reading and has held that national banks can be "located" in more

than one place.[57] Since the predicate of the 7th Circuit's decision was a narrow reading of the venue provision, it is questionable whether it would reach the same conclusion in light of this Court's holding in the *Citizens and Southern* case.

After reaching this basic determination, the 7th Circuit then discussed the "except" clause of Section 85 and found that since it applied to national banks "organized or existing in any such State", a national bank "existing" in a different state than the state in which it was "located" could alternatively charge the rate limited for state banks in the foreign state.

Thus, the court held that Illinois law applied to all loans made in Illinois or elsewhere, but that if the national bank existed in Iowa and if Iowa allowed *state banks* to charge a higher rate, the national bank could charge such higher rate to customers in Iowa. By this holding, a national bank is placed in the position of being able to charge a higher rate of interest than *any lender* in a state where it is not "located", but where it is doing business, with the proviso that if a *state bank* in the foreign state is permitted a higher rate than the rate permitted in the home state, this higher rate can be charged. Thus, under this decision, a national bank can be placed in a position of competitive superiority to *any lender* in a foreign state where it is doing business. On the other hand, if the foreign state permits lenders, other than state banks, to charge higher rates than the home state of the national bank, the national bank cannot match such rates. This appears to be a particularly tortuous reading of Section 85 and contrary to the rationale followed by this Court in the *Citizens and Southern* case, *supra*.

[57] *Infra*, at 48-49.

B. The Eighth Circuit and the Court Below Misconstrued the Holding in the Seventh Circuit *Fisher* Case

The 8th Circuit in *Fisher* v. *First National Bank of Omaha*, 548 F.2d 255 (1977), in a clear misreading of the 7th Circuit's *Fisher* decision, went even further. The 8th Circuit *Fisher* case involved a national bank, the respondent in this case, which had its principal place of business in Nebraska and which was engaging in the credit card business in Iowa. The court posed the issue as whether it was required to apply the law of Nebraska or the law of Iowa to transactions which were initiated in Iowa, but consummated in Nebraska.

The District Court had held that the credit was extended in Nebraska and that Nebraska law should apply. The Court of Appeals held that it made no difference whether the transactions were characterized as Nebraska transactions or Iowa transactions. The court, completely misreading the 7th Circuit *Fisher* case, stated that such case held that if a national bank in one state made a loan in another state in which it is doing business, and if there is a differential between the states, the bank may charge the higher of the two rates.[58] The court did not indulge in any statutory construction to reach this remarkable conclusion. On the basis of this mistaken interpretation of the earlier *Fisher* case, the court held that the national bank could charge the highest permissible Nebraska rate for the same class of loan for loans made in Iowa because the maximum rate allowable in Iowa was no higher than the maximum rate allowable in Nebraska, but if Iowa

[58] As has been previously shown, the 7th Circuit actually held that a national bank is limited to the rates allowed by its home state with the sole exception that if the state where it is doing business allows *state banks* to charge higher rates, it may match such rates.

permitted a higher rate, the national bank would be entitled to charge such higher rate. The court also held that the national bank could charge rates permitted by the Nebraska small loan law, which were prohibited to state banks, because the credit card transactions were a similar type of credit to the loans governed by the small loan law.

The 8th Circuit *Fisher* decision thus placed national banks doing business in more than one state in a position of clear competitive superiority over state banks.

In its decision below, the Supreme Court of Minnesota followed the decision of the 8th Circuit *Fisher* case and held that a national bank may charge its nonresident credit card customers an interest rate on unpaid accounts allowable in the state where it is "located", or the interest rate of the state where it is doing business, whichever is higher.

The Minnesota court adopted the 8th Circuit reading of Section 85 without recognizing that the 8th Circuit itself had significantly misinterpreted the 7th Circuit *Fisher* holding. The court below, however, held that if it were writing on a clean slate, it would hold that interest rates should be applied uniformly to *all banks* doing business in the state since it felt that such reasoning was more consistent with the history and purpose of the National Bank Act. The court recognized that allowing a national bank to transport an interest rate from state to state could give it a distinct advantage in competing with state institutions. Three justices of the Minnesota Supreme Court dissented from its holding and pointed out that this holding also had the effect of putting out-of-state national banks in a position of competitive superiority over in-state national banks.

C. The Result Reached Below and in the *Fisher* Cases Is Clearly Erroneous

The result reached below and in the *Fisher* cases is clearly an incorrect interpretation of Section 85. Other courts have reached a contrary determination and the language of Section 85 permits an interpretation more consistent with its underlying purpose of not allowing national banks to be subjected to competitive discrimination.

1. Other interpretations of Section 85 are more rational than the one adopted below

In *Meadow Brook National Bank* v. *Recile,* 302 F.Supp. 62 (E.D. La. 1969), the national bank was "located" in New York and made a loan in Louisiana. The district court held that Section 85 was not applicable to the Louisiana transaction on the theory that its terms governed loans made in the state where the national bank is located. The court held that loans outside the state where the national bank is "located" ought to be governed by the laws of the state where the loan is made. It is not clear from the court's opinion whether the national bank would be limited to the rate permitted state banks or could charge the rates permitted any lender.

In arriving at this interpretation, the court concluded that it was the congressional intent to place national banks on an equal footing with state banks and pointed out that "the courts have strenuously endeavored to effectuate its purpose despite the fact that the language of that section may not clearly and readily yield the result intended by Congress." The court pointed out what the 7th Circuit *Fisher* case did not discuss, namely, that a national bank located in a state

where the interest rate was low would be disadvantaged in making loans elsewhere and, in the reverse situation, would have a competitive advantage if it were limited to the rates permitted by its home state. Of course, the 8th Circuit *Fisher* holding wiped out the former problem by simply holding that a national bank could charge the highest rate of the state where it was "located" or where it was doing business.

Another interpretation of Section 85 which would achieve the congressional intent of competitive equality and be consistent with the statutory language is to hold that the word "located", in light of present day realities, means the place where the bank is doing business.[59] Thus, a national bank doing business in more than one state would be obliged to follow the law of the state where it is doing business with respect to the

[59] The 8th Circuit and the court below, by holding that national banks can charge the higher interest rate of their home state or the state where the bank is doing business, have also in effect read "located" in the first sentence of Section 85 to embrace more than one state. Since neither court, however, attempts to reconcile its conclusion with the words of the statute, it is impossible to determine how it was concluded that Section 85 permits a national bank to pick and choose which state's interest rates it will follow. As previously noted, the 7th Circuit read the word "located" as limiting the national bank to the interest rate of its home state. The court added the proviso that the "except" clause of Section 85 permitted a national bank to match the interest rate of a state bank in the state where the national bank is doing business if that rate is higher than the home state rate. This conclusion at least attempts to track the statutory language. The 8th Circuit and the court below, on the other hand, do not explain their rationale for concluding that a national bank can charge the higher rate of the state where it is "located" or the state where it is doing business. If a national bank can be "located" in more than one state, which is the implicit assumption of those opinions, then it must be limited by the interest rates of each such state.

business done within that state.[60] The Conference urges this interpretation of Section 85 in order to restore a semblance of competitive equality between state and national banks. This interpretation of Section 85 would also be consistent with other interpretations of the National Bank Act by this Court.

In *Citizens and Southern National Bank* v. *Bougas, supra,* this Court held that a national banks can be "located" in a plurality of places for purposes of Section 94 of the National Bank Act dealing with venue. In that case a suit had been filed in the state court of the county of the branch and not in the court of the different county specified in the bank's charter.[61]

The Court noted that it was not until 1933 that national banks were permitted branches beyond the place named in the charter. The Court thus found that Congress did not contemplate today's banking system when it formulated the 1864 Act; that there are no sure indicators of 1864 congressional intent with respect to a banking system that did not then exist; and that prior to 1933 Congress had no occasion to be concerned with state court venue other than at the plaee designated in the bank's charter. The Court observed that "there is no enduring rigidity about the word 'lo-

[60] The Conference recognizes that there might be occasions where it would be difficult to establish where the business is being transacted, but these situations could be governed by traditional conflict of laws principles.

[61] 12 U.S.C. § 94 reads as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

cated' " and found that congressional concern about interruption of a national bank's business by compelled production of records for distant litigation evaporated when venue coincided with the location of a branch.

Here too, credit card transactions were completely unforeseen in 1864 when Section 85 was adopted, and banks in one state did not do business to any significant degree in states other than their home state. It is thus difficult to discern any specific congressional intent on the issue now before the Court of what state law applies when a national bank does business in many states. As discussed below, Congress was only concerned in 1864 with the issue of competitive equality among lenders within the same state. It would be entirely consistent with the philosophy of the *Citizens and Southern National Bank* case, *supra,* to adopt an interpretation of "located" in Section 85 which carries out the basic congressional intent in the National Bank Act to achieve competitive equality for state and national banks.

This overriding purpose of the National Bank Act is well illustrated by this Court's decision in *Daggs* v. *Phoenix National Bank,* 177 U.S. 549 (1900). In that case the state did not "fix" an interest rate, but rather "allowed" any rate. It was argued that since the state did not "fix" a rate, the second sentence of Section 85 applied to national banks and limited their interest rate to 7%.[62] The Court held that this interpretation of Section 85 would discriminate against national banks. The Court relied on the language of the first sentence of Section 85 that national banks could charge the rate "allowed" by state law. The court stated that the word

[62] *See* Appendix D.

"fixed" in the second sentence must mean "allowed". In effect, this interpretation reads the second sentence out of the statute since, even if a state had no law on interest rates, it would be "allowing" any interest rate. This shows the extent to which this Court has gone to interpret Section 85 in order to achieve its underlying purpose and this philosophy should guide the Court in this case.[63]

2. The legislative history of Section 85 provides no support for the proposition that national banks can charge out-of-state interest rates within another state

Obviously, Congress in 1864 could not have foreseen the development of interstate transactions by credit cards and computers which have given rise to this particular problem of statutory interpretation. Congress simply *assumed* that the bank would be "located" in the same State where it does business, and that, therefore, the law of the state in which the transaction took place would apply. Congress probably would have found it unthinkable that a national bank could charge a rate of interest higher than any rate allowed in the state of the transaction.

The positions of the two factions of the debate in Congress were relatively clear. On one side were Senators Grimes, Henderson, Doolittle and their followers who sought to prevent the national associations from

[63] In *Hiatt* v. *San Francisco Nat'l Bank,* 361 F.2d 504 (9th Cir. 1966), *cert. denied,* 385 U.S. 948 (1966), no rate was fixed by the state for state banks, but a rate was fixed for other lenders. The plaintiff contended that "no" rate was not a "different" rate and, hence, national banks were limited to the rate applicable to other lenders. In order to insure competitive equality, however, the court overrode this literal reading of Section 85 and held that the national bank could charge any rate because state banks could do so.

gaining a competitive advantage over state banks. On the other side were Senators Sherman, Trumbull and others who sought to create a strong system of national banks and who did not want the states to be able to discriminate against the new associations. Neither group, however, even mentioned the possibility that a national bank based in another state could charge *that* state's higher interest rate, thus *completely* evading the local state's usury limitations.

Some of the rebuttals Senator Sherman and others delivered to the Grimes faction would be simply irrelevant if national banks were not restricted to the interest rates of the states where they are doing business. A common theme was that if the states faced a situation in which the state banks were limited to a lower rate than the national banks, the legislature could modify the rate for state banks.[64] But if the national bank's interest rate is determined by *another* state's laws, the state where the transaction took place would lose control entirely of the rates set within its borders. The only way it could achieve competitive equality for its own lenders would be to mirror the laws of another state. Even the supporters of the national banks, therefore, believed that the states would have *some* powers to control national bank rates by altering their own interest limitations.

Proponents of a uniform rate of interest for national banks had warned that to permit the states to control the interest rates of the national banks would cause capital to move from those states with lower interest rates to those with higher yields, mostly the Western

[64] *See, e.g., Cong. Globe, supra* note 26, at 2124 (remarks of Mr. Conness).

undeveloped states.[65] This argument assumed that the states would be able to control the interest rate of national banks within their borders. Furthermore, to permit national banks to charge interest at the rate of their home states in transactions all across the country would either provoke a rush of banks to states with higher allowable limits or have a tendency to move the rates of all states to the highest allowable limits of any state.

In the 1864 debates it was assumed that the rate of the state where the national bank was doing business would control. For example:

> SENATOR GRIMES: "... [I]n the States of Illinois and Iowa the [National] banks may take ten per cent, under this law on all money transactions, while in the States adjacent they can only take six per cent."[66]
>
> SENATER TRUMBULL: "This provision of the bill is not an interference with the States, but on the other hand an agreement with the States. It allows the same rate of interest in a State which is allowed by the laws of the State."[67]
>
> SENATOR SUMNER: "[I]f this provision be objectionable to any State let the State fix the rate of interest to be charged within its borders, or let the State adapt itself to the seven per cent, fixed here in the absence of a State regulation."[68]
>
> SENATOR SHERMAN: "The State of Iowa has it in her power at any time to repeal this exemption in

[65] *See, e.g., Id.* at 1353 (remarks of Mr. Stevens).

[66] *Id.* at 2123.

[67] *Id.* at 2124.

[68] *Id.*

favor of the State banks; but while those banks are organized and exist there, and have the privilege of receiving eight per cent interest, I do not see any reason why the same privilege should not be extended to the national banks."[69]

When Congress last amended Section 85 in 1974 to permit a limited exception to the applicability of state law to the interest rates of national banks in what was deemed to be an emergency situation applicable to only three states, it made the exception of a limited duration and subject to being overridden by subsequently adopted state laws, whichever should first occur. The legislative history made it clear that this limited exception did not reflect a federal policy of overriding state law in this area. 1974 U.S. Code Cong. & Ad. News, pp. 6249, 6261. Thus, Congress has only recently reaffirmed its intent that a state's laws govern the interest rates charged within its borders by national banks, as well as other lenders.

[69] *Id.*

CONCLUSION

The Supervisors urge that *Tiffany* was incorrectly decided, that it should be overruled, and that this Court should hold that national banks are limited to the rates of interest permitted to state banks by the laws of the states where the national banks are doing business. If, however, the Court declines to overrule *Tiffany,* it should hold that 12 U.S.C. § 85 does not permit out-of state national banks to charge a higher interest rate within a state than that state allows any of its lenders to charge, including state and national banks. In either case, the judgment of the Supreme Court of Minnesota must be reversed.

Respectfully submitted,

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July 6, 1978

APPENDIX

APPENDIX A

THE DUAL BANKING SYSTEM

(as of December 31, 1977)

	Number of banks	Per cent all banks	Total assets (000,000)	Per cent all assets
State Banks				
Commercial	10,083	66.3%	$ 521,292	39.4%
Mutual	467	3.1	147,329	11.1
Total	10,550	69.4	668,621	50.5
National Banks	4,655	30.6	655,316	49.5
All Banks	15,205	100.0	1,323,937	100.0
State Banks				
Commercial:				
Federal Reserve Members	1,014	10.1%	$ 210,441	40.4%
Insured Non-members	8,743	86.7	271,929	52.2
Non-Insured	326	3.2	38,921	7.4
Total	10,083	100.0	521,292	100.0
Mutual Savings Banks	467		147,329	
Total	10,550		668,621	

APPENDIX B

Maximum Interest Rates Permitted To Any Lender And To State-Chartered Banks On Consumer Loans Or Instalment Loans Up To $1,000

State	Maximum any other lender	Maximum state-chartered banks
Alabama	3% to $200, 2% to $300; add-on: 15% per year to $500 and 10% to $1,000	Same as other
Alaska	3% to $400, 2% to $800	6% per year discount
Arizona	3% to $300, 2% to $600, 1½% to $1,500	8% per year add-on
California	2½% to $225, 2% to $625, 1½% to $1,650	Banks exempt
Colorado	36% per year to $300, 21% to $1,000	Same as other
Connecticut	Add-on: 17% per year to $300, 11% to $5,000	Banks exempt
Delaware	9% per year discount	9% per year discount
Florida	30% per year to $500, 24% to $1,000	6% per year discount
Georgia	8% per year discount	7% per year add-on
Hawaii	3½% to $100, 2½% to $300; over $300, 12% per year discount	12% per year discount
Idaho	36% per year to $480, 21% to $1,600	Same as other
Illinois	2½% to $300, 2% to $600, 1½% to $1,500	7% per year add-on
Indiana	36% per year to $390, 21% to $1,300	Same as other
Iowa	3% to $250, 2% to $400, 1½% to $1,000	15% per year
Kansas	36% per year to $300, 21% to $1,000	18% per year
Kentucky	3% to $500, 2% to $1,200	6% per year discount
Louisiana	36% per year to $800	Same as other
Maine	30% per year to $390, 21% to $1,300	Same as other
Maryland	2¾% to $300, 2% to $500, 1¼% to $1,200	18% per year
Massachusetts	18% per year	Same as other
Michigan	2½% to $400, 1¼% to $1,500	7% per year add-on
Minnesota	2¾% to $300, 1½% to $600, 1¼% to $1,200	12% per year
Mississippi	36% per year to $600, 33% to $1,800	8% per year add-on

State	Maximum any other lender	Maximum state-chartered banks
Missouri	15% per year to $500, 10% on excess	Same as other
Montana	Add on: 20% per year to $300, 16% to $500, 12% to $1,000	Discount: 11% to $300, 9% to $1,000
Nebraska	30% per year to $300, 24% to $500, 18% to $1,000	18% per year
Nevada	36% per year to $300, 21% to $1,000	Discount: 8% per year to $500, 7% on excess
New Hampshire	2% to $600, 1½% to $1,500	1½% per month
New Jersey	24% per year to $500, 22% to $1,500	12% per year
New Mexico	3% to $150, 2½% to $300, 1% to $2,500	7% per year add-on
New York	2½% to $100, 2% to $300, 1½% to $900	6% per year discount
North Carolina	3% to $300, 1½% to $1,500; 15% per year add-on to $500	15% per year
North Dakota	2½% to $250, 2% to $500, 1¾% to $750	12% per year
Ohio	Add-on: 16% per year to $750, 11% to $1,500	8% per year discount
Oklahoma	30% per year to $300, 21% to $1,000	Same as other
Oregon	3% to $300, 1¾% to $1,000	15% per year
Pennsylvania	9½% per year discount	6% per year discount
Rhode Island	3% to $300, 2½% to $800	21% per year
South Carolina	36% per year to $300, 21% to $1,000	7% per year add-on
South Dakota	2½% to $300, 2% to $1,000	8% per year add-on
Tennessee	7½% per year discount	6% per year discount
Texas	Add-on: 18% per year to $300, 8% to $2,500	Same as other
Utah	36% per year to $480, 21% to $1,600	Same as other
Vermont	14% per year add-on	6% per year discount
Virginia	2½% to $500; 13% per year add-on to $1,000	7% per year add-on
Washington	2½% to $500, 1½% to $1,000	12% per year simple
West Virginia	36% per year to $200, 24% to $600, 18% to $1,200	6% per year discount
Wisconsin	18% per year	18% per year to $500, 12% on excess
Wyoming	36% per year to $300, 21% to $1,000	Same as other

Source: National Consumer Finance Association, ***Summary of State Consumer Credit Laws and Rates***, April 1978.

APPENDIX C

Maximum Interest Rates Permitted To Any Lender And To State-Chartered Banks On Any Type of Loan In Amounts Of $300 And $1,000[1]

State	$300		$1,000	
	Maximum any other lender	Maximum state-chartered banks	Maximum any other lender	Maximum state-chartered banks
Alabama	2% per mo	2% per mo	1½% per mo	1½% per mo
Alaska	3% per mo	1½% per mo	1½% per mo	1½% per mo
Arizona	3% per mo	1½% per mo	1½% per mo	1½% per mo
California	2% per mo	[2]	1½% per mo	[2]
Colorado	36% per yr	36% per yr	21% per yr	21% per yr
Connecticut	17% per yr add-on	[3]	11% per yr add-on	[3]
Delaware	1½% per mo	1½% per mo	9% per yr discount	1% per mo
Florida	30% per yr	1½% per mo	24% per yr	1½% per mo
Georgia	1½% per mo	1½% per mo	1½% per mo	1½% per mo
Hawaii	2½% per mo	12% per yr discount	12% per yr discount	12% per yr discount
Idaho	36% per yr	36% per yr	21% per yr	21% per yr
Illinois	2½% per mo	1½% per mo	1½% per mo	1½% per mo
Indiana	36% per yr	36% per yr	21% per yr	21% per yr
Iowa	3% per mo	1½% per mo	1½% per mo	1¼% per mo
Kansas	36% per yr	18% per yr	21% per yr	18% per yr
Kentucky	3% per mo	1½% per mo	2% per mo	1½% per mo
Louisiana	36% per yr	36% per yr	27% per yr	27% per yr
Maine	30% per yr	30% per yr	21% per yr	21% per yr
Maryland	2¾% per mo	1½% per mo	1¼% per mo	18% per yr
Massachusetts	18% per yr	18% per yr	18% per yr	18% per yr
Michigan	2½% per mo	1½% per mo	1.7% per mo	1½% per mo
Minnesota	2¾% per mo	1% per mo	1¼% per mo	1% per mo
Mississippi	36% per yr	1½% per mo	33% per yr	1¼% per mo
Missouri	15% per yr	15% per yr	10% per yr	10% per yr
Montana	20% per yr add-on	11% per yr discount	12% per yr add-on	9% per yr discount
Nebraska	30% per yr	18% per yr	18% per yr	18% per yr

State	$300		$1,000	
	Maximum any other lender	Maximum state-chartered banks	Maximum any other lender	Maximum state-chartered banks
Nevada	36% per yr	1.8% per mo	21% per yr	1.8% per mo
New Hampshire	2% per mo	1½% per mo	1½% per mo	1½% per mo
New Jersey	24% per yr	15% per yr	22% per yr	15% per yr
New Mexico	2½% per mo	1½% per mo	1% per mo	1% per mo
New York	2% per mo	1½% per mo	1¼% per mo	1% per mo
North Carolina	3% per mo	1½% per mo	1½% per mo	1½% per mo
North Dakota	2½% per mo	1½% per mo	1½% per mo	1½% per mo
Ohio	16% per yr add-on	1½% per mo	11% per yr add-on	8% per yr discount
Oklahoma	30% per yr	30% per yr	21% per yr	21% per yr
Oregon	3% per mo	15% per yr	1¾% per mo	15% per yr
Pennsylvania	2% per mo	1% per mo	2% per mo	1% per mo
Rhode Island	3% per mo	21% per yr	2% per mo	21% per yr
South Carolina	36% per yr	1½% per mo	21% per yr	1½% per mo
South Dakota	2½% per mo	2% per mo	2% per mo	1½% per mo
Tennessee	1½% per mo	1½% per mo	1½% per mo	1½% per mo
Texas	18% per yr add-on	18% per yr add-on	8% per yr add-on	8% per yr add-on
Utah	36% per yr	36% per yr	21% per yr	21% per yr
Vermont	14% per yr add-on	1½% per mo	14% per yr add-on	1% per mo
Virginia	2½% per mo	1½% per mo	13% per yr add-on	1½% per mo
Washington	2½% per mo	12% per yr (simple)	1½% per mo	12% per yr (simple)
West Virginia	36% per yr	1½% per mo	18% per yr	1% per mo
Wisconsin	18% per yr	18% per yr	9½% per yr discount	12% per yr
Wyoming	36% per yr	36% per yr	21% per yr	21% per yr

[1] Some states permit an additional charge or fee, but these are not included herein.

[2] Banks are exempt from the general usury law; however, they are limited to 1½% per mo. up to $1,000 and 1% on excess for revolving credit.

[3] Banks are exempt from the general usury law; however, they are limited to 15% per year on revolving credit.

Source: National Consumer Finance Association, *Summary of State Consumer Credit Laws and Rates*, April 1978.

APPENDIX D

Section 85 of the National Bank Act 12 U.S.C. § 85

Any association may take, receive, reserve, and charge on any loan or discount made, or upon any notes, bills of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State, Territory, or District where the bank is located, or at a rate of 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, [or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,] whichever may be the greater, and no more, except that where by the laws of any State a different rate is limited for banks organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this chapter. When no rate is fixed by the laws of the State, or Territory, or District, the bank may take, receive, reserve, or charge a rate not exceeding 7 per centum, or 1 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal reserve bank in the Federal reserve district where the bank is located, [or in the case of business or agricultural loans in the amount of $25,000 or more, at a rate of 5 per centum in excess of the discount rate on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the bank is located,] whichever may be the greater, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. The maximum amount of interest

or discount to be charged at a branch of an association located outside of the States of the United States and the District of Columbia shall be at the rate allowed by the laws of the country, territory, dependency, province, dominion, insular possession, or other political subdivision where the branch is located. And the purchase, discount, or sale of a bona fide bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

Note: The bracketed material was added by Pub. L. 93-501, October 29, 1974. It is not applicable after July 1, 1977. See 1974 U.S. Code Cong. and Adm. News, pp. 6249, 6259.